THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

Coram: Buteera, DCJ, Kakuru, Bamugemereire, Madrama and Mulyagonja, JJCC

CONSTITUTIONAL PETITION NO. 0016 OF 2017

1. UNWANTED WITNESS-UGANDA
2. TUMUHIMBISE NORMAN ::::::::::::::::::::::::PETITIONERS

VERSUS

ATTORNEY GENERAL :::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT OF IRENE MULYAGONJA, JCC

Introduction

This petition was brought under Article 137 (3) (a) of the Constitution of the Republic of Uganda and rule 3 of the Constitutional Court (Petitions and References) Rules, S.I 91 of 2015. The petition was to challenge the shutdown of social media by the respondent and the blocking or shutting down of access to mobile money services during the Presidential and Parliamentary Elections in February 2016 and the swearing in of the President-Elect in May 2016.

The grounds of the petition were that:

1. The blocking or shutting down of social media by the respondent during the presidential, parliamentary and local (sic) elections in February 2016 was inconsistent with, and violated Article 29 (1) (a) of the Constitution and the guaranteed right to freedom of speech and expression.

2. The blocking and shutting down of mobile money transfer services during the general elections in February 2016 violated Articles 22 (1) and 45 of the Constitution of Uganda, which protects the right to livelihood and life.

3. The blocking and shutting down of social media by the respondent on 11th to 12th May 2016 during the inauguration of the President-Elect violated Article 29 (1) (a) of the Constitution of Uganda which guarantees the right to freedom of speech and expression.

The petitioners sought the following declarations:

1. That the blocking and shutting down of social media, purportedly done under the authority of the Uganda Communications Commission Act, 2013, during the General Elections in February 2017 was unconstitutional.

2. That the blocking and shutting down of mobile money transfer services purportedly done under the authority of the Uganda Communications Act, 2013 was unconstitutional.

3. That the blocking and shutting down, during the presidential inauguration in May 2016, of social media by the respondent purportedly done under the authority of the Uganda Communications Act, 2013 was unconstitutional.

4. That the respondent pays the costs of the petition.

The petition was supported by the affidavit of Geoffrey Ssebagala Wokulira, Executive Officer of the 1st petitioner sworn on the 24th of April 2017 in which he stated that during the Presidential, Parliamentary and Local Government Council Elections in 2016, the respondent ordered, instructed or directed telecommunication

operators and other internet service providers to block or shut down social media and mobile money transfer services. That as a result, the services were inaccessible across Uganda and many people tried but failed to access them. He referred to the affidavits of several persons that were filed to support the petition, whose contents are stated below.

He further averred that he believes that the instructions, orders or directives of the respondent to telecommunications and internet service providers was a threat to the maintenance of a free and democratic society that is anchored on human rights and constitutionalism.

In addition the 2nd petitioner deposed an affidavit in which he stated that he is the coordinator of the Jobless Brotherhood. That on the 18th February 2016 he was supposed to conduct a skype interview with another organisation, Beautiful Trouble, and the purpose was to submit his contribution to a book which is published once a year. That he failed to make his contribution because of lack of access to the internet. That by the time the internet was reconnected on 20th February 2016 he had missed the deadline to contribute to the book. As a result, his contract was terminated leading to loss of US$ 500 which is given to contributors, a big loss to him as a jobless youth.

In another affidavit sworn by Chemonges Ivan on 24th April 2017 he stated that while he was en route to Ishaka District to collect application forms for admission to Mabarara University of Science and Technology he was prevented from withdrawing money from his mobile money account to enable him to continue on his journey. That as a result he spent three days at the lodgings of a friend who later asked him to pay UShs 106,000/= for his upkeep. That when he finally got to Mbarara University he was informed that the deadline for submission of the application had passed. That he could not apply to join any other University, so he suffered mental and psychological anguish.

In his affidavit in support sworn on 24th April 2017, Ochen Dickson Ojackol averred that the shutting down of mobile money services prevented him from sending money to his mother to access medical care. That the condition of the mother deteriorated because he could not send her money and he too suffered mental and psychological anguish. Okure Nathan who swore his affidavit in support of the petition on 24th April 2017, stated that he suffered a similar fate.

In answer to the petition, the respondent raised the objection that the petition did not raise any questions for constitutional interpretation. But in answer to the substance of the petition, the respondent stated that the blocking and shutting down of social media during the Presidential, Parliamentary and Local Council Elections in 2016 did not contravene or violate Articles 29 (1) (a), 22 (1) and 45 of the Constitution. Neither did it contravene the same provisions during the inauguration of the President-elect.

The respondent further stated that suspension of social media was on account of national security and in the public interest which necessitated the immediate suspension of the services to secure peace and order. That the suspension was done in good faith and for proposes of securing the country against the reasonably suspected risk of incitement of violence by publishing unregulated content on social media. Finally, that this is permissible under Article 43 of the Constitution.

Representation

At the hearing of the petition, Mr. Kwemara Kafuzi and Ms. Stella Nakamya represented the 1st petitioner. The respondent was represented by Mr Oburu Odoi, Principal State Attorney in the Attorney General's Chambers. No one appeared on behalf of the 2nd respondent and he was absent.

Counsel for the respondent applied to adopt his conferencing notes as his submissions and court granted the application. Counsel for the petitioner applied to file written submissions after the hearing and was granted leave to do so. He filed written submissions on 6th January 2021. The petition was therefore disposed of on the basis of written submissions.

Issues

In his submissions, the 1st petitioner raised two issue for the determination of this court as follows:

1. Whether the actions of blocking and shutting down social media platforms and mobile money transfer services during the general elections of February 2016 by the respondent was a violation of Articles 29 (1) (a), 22 (1) and 45 of the Constitution.

2. Whether the petitioners are entitled to the remedies that they sought.

Submissions of the Petitioner

In his submissions, counsel for the petitioners stated that this court has the jurisdiction to entertain this petition because it was brought under Article 137 (3) (b) of the Constitution which provides that a person who alleges that any act or omission by any person or authority is inconsistent with or in contravention of a provision of the Constitution may petition the Constitutional court for a declaration to that effect and for redress where appropriate.

Further that this court has the jurisdiction to entertain the petition since it alleges that the actions of blocking and shutting down of social media platforms and mobile money transfer services during the General

Elections of February 2016 by the respondent was a violation of the Constitution.

With regard to the 1st issue, counsel for the petitioner submitted that Article 29 (1) (a) guarantees the right to freedom of speech and expression which shall include freedom of the press and other media. Further that Article 22 (1) of the Constitution provides for the protection of life. That Article 45 of the Constitution provides that the rights, duties and freedoms specifically mentioned in Chapter Four shall not be regarded as excluding others not specifically mentioned, in which the right to a livelihood falls.

He further submitted that the right to speech and expression is guaranteed. That given it literal meaning, other media includes telephones, laptops, social media platforms which include WhatsApp, Twitter, Facebook and others. That through these media, Ugandans can freely express their thoughts on different issues including political, social and economic. He referred to the different averments in the affidavits in support of the petition and the complaints of the various deponents about the shutting down of the various platforms.

Counsel for the petitioner then submitted that democracy and the freedom of expression are intertwined. He referred us to **R v Zundel [1992] 2 S.C.R 731** and **Edmonton Journal v Alberta (AG) (1989) SCR 1326,** where it was held that it is difficult to imagine a guaranteed right more important in a democratic society than the freedom of expression. That indeed a democratic society cannot exist without the freedom of expressing new ideas and putting opinions about the functioning of public institutions forward.

Counsel then referred to Objective II of the National Objectives and Directive Principles of State Policy in the Constitution in which it is stated that the state shall be based on democratic principles which

empower and encourage the active participation of all citizens at all levels in their governance. He also referred us to the Preamble to the Constitution, which indicates where the country Uganda has been and where we want to be as a democratic society with freedom of expression at the centre. He referred us to **Rangarajan v Jagijivan Ram & Others 1989 (2) SCC 574** and **Union of India & Others v Jagjivan (1990) LRC (Court) 424-427** where it was held that in a democratic state, freedom of expression is not to be taken for granted. Governance is by open discussion of ideas by citizens; be it wise or unwise, foolish or dangerous, statements must be tolerated in a democracy. That Uganda is a democratic society and it must apply universal standards of a democratic society.

Counsel further submitted that the protection of the right to freedom of expression is of great significance to democracy. That the meaningful participation of citizens is a hallmark of democracy which can only be achieved through optimal exercise of freedom of expression. He referred us to **Edward Kayima Lugonvu & 3 Others v Attorney General, Constitutional Petition No 24 of 2009** and **Attorney General v Major General David Tinyefuza, Constitutional Appeal No 1 of 1997** for some of the principles for constitutional interpretation.

He attacked the response of the respondent, through an affidavit of a State Attorney, who stated that the shutting down of social media and mobile money platforms did not contravene the Constitution without justification or making inquiries from the Uganda Communications Commission which regulates telecommunications in Uganda. He prayed that this court finds that the respondent's averments of fact in relation to blocking social media and mobile money during the elections had not been proved at all. That the actions of the Commission contravened Article 29 (1) (a), 22 (1) and 45 and this court should find so and grant the declarations prayed for.

In reply, counsel for the respondent submitted that the respondent opposes the petition in its totality because it does not raise any questions requiring the interpretation of the Constitution. It is therefore misconceived, frivolous and vexatious.

Further, that the Constitution establishes Uganda as a democratic society and it operates through the principles of democracy and good governance. That much as the Constitution provides for the right to freedom of speech and expression in Article 29, the right guaranteed is not absolute and non-derogable in nature. Thus the respondent in February 2016, during the elections, ordered telecommunication operators and internet service providers to block, shutdown and slow internet and it was not in contravention of the Constitution as alleged by the petitioners.

Counsel for the respondent went on to assert that Article 22 (1) and 45 of the Constitution protect life and livelihood and blocking of and shutting down of social media and mobile money transfer services during the general elections was not inconsistent with the Constitution and did not in any way deprive the petitioners of their right to life and livelihood. That in addition, the blocking of the same services during the presidential inauguration did not in any way deprive the petitioners of their right to life and livelihood.

In addition, counsel for the respondent submitted that the actions of the respondent were permissible under Article 43 of the Constitution and thus were not inconsistent with the Constitution. He explained that in the enjoyment of rights and freedoms prescribed in Chapter Four, no person shall prejudice the fundamental or other rights and freedoms of others or the public interest. That the respondent's blocking, shutting down and slowing down of the internet was done in the public interest. He explained that Article 43 (2) (c) of the Constitution is to the effect

that any limitation to the enjoyment of the rights and freedoms prescribed in Chapter Four should not be beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided for in the Constitution. He concluded that the respondent's actions were in good faith and therefore justifiable as the instructions, directives and orders given to the telecommunication operators and internet service providers were within what was provided for in the Constitution, and most importantly for the purposes of national security, peace and order.

Resolution of the petition

The respondent's counsel raised an objection that the petition does not raise any question for constitutional interpretation. The petitioner's counsel contended that it does and cited Article 137 (2) (b) of the Constitution. He did not support his arguments with any authorities and left it to court to make its decision on the issue. I think it is a question that deserves consideration before I attempt to deal with the grounds raised by the petitioner, as is provided for under Order 6 rule 28 of the Civil Procedure Rules. See also **Attorney General v David Tinyefuza, Constitutional Appeal No 1 of 1997.**

In order to give clarity to the discussion, it is important to set down the relevant part of Article 137 of the Constitution; it provides as follows:

> **137. Questions as to the interpretation of the Constitution.**
>
> **(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**
>
> **(2) When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court.**
>
> **(3) A person who alleges that—**
>
> **(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or**

(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

In **Ismael Serugo v. Kampala City Council, Constitutional Appeal No. 02 of 1998**, the Supreme Court (Kanyeihamba, JSC) reviewed its decision in **Attorney General v David Tinyefuza (supra)** and stated thus:

> *There is a number of facets to the decision of the Supreme Court in that case. Nevertheless, when it comes to that Court's view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that the Constitutional Court has no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The judgment of the majority in that case, [Wambuzi, C.J., Tsekooko J.S.C., Karokora J.S.C., and Kanyeihamba J.S.C], is that to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought from it in the same petition. It is therefore erroneous for any petition to rely solely on the provisions of Article 50 or any other Article of the Constitution without reference to the provisions of Article 137 which is the sole Article that breathes life in the jurisdiction of the Court of Appeal as a Constitutional Court.*

The Supreme Court (Wambuzi, CJ) in **Attorney General v. Tinyefuza** (supra) set out the limits of the jurisdiction of this court as provided for in Article 137 (1) of the Constitution, as follows:

> *"In my view, jurisdiction of the Constitutional Court is limited in Article 137 (1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances, I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation of the Constitution or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction."*

In similar vein, Mulenga, JSC, stated thus:

"Taking the jurisdiction of the Court under Article 137 as a whole, I would state thus: it embraces references and petitions whose resolution depend either on the interpretation of a provision of the Constitution or on determination of a question on inconsistence with, or contravention of, a provision of the Constitution."

There is also the view that it is within the jurisdiction of all courts in the land to give meaning to the provisions of the Constitution and to enforce its provisions. In **Attorney General v Tinyefuza** (supra) Kanyeihamba, JSC, expressed it in the following terms:

"The marginal note to Article 137 states that it is an Article which deals with questions relating to the interpretation of the Constitution. In my opinion, there is a big difference between applying and enforcing the provisions of the Constitution and interpreting it. Whereas any court of law and tribunals with competent jurisdiction may be moved by litigants in ordinary suits, applications or motions to hear complaints and determine the rights and freedoms enshrined in the Constitution and other laws, under Article 137 only the Court of Appeal sitting as the Constitutional Court may be moved to interpret the Constitution with a right of appeal to this Court as the appellate court of last resort."

If that is the meaning of Article 137 (1) what then is the meaning of clause 3 (b) thereof? Mulenga, JSC, in the same case gave it the following meaning:

"By giving the ordinary and natural meaning to the wording in the two clauses it is evident that under clause (3) the Constitutional Court is empowered to, and may "interpret" provisions of an Act of Parliament or any other law in order to determine whether such Act or other law is inconsistent with some provision of the Constitution even if the latter is so clear that there is "no question as to its interpretation." Similarly under paragraph (b) the court is empowered and may access, analyse or evaluate the import of an Act or omission by any person in order to determine whether such act or omission is in contravention of a provision of the constitution, without having to interpret or give meaning to that provision. In my considered opinion therefore, the jurisdiction of the Constitutional Court to be exercised over causes of action under Clause (3) is broader than interpretation of provisions of the Constitution in the narrow sense of ***"giving meaning to words and expressions"*** *in the Constitution."* *{Emphasis in bold characters was supplied}*

The petitioners in this case did not pose a question for the interpretation of any Act of Parliament or law that contravenes any of the Articles of the Constitution referred to in their pleadings; neither did they complain about any provision within the Constitution whose interpretation they sought from this court. The words of the provisions said to have been violated by the respondent are also clear and unambiguous, the petitioners did not seek to have the meaning of any specific words given meaning by this court. The complaints were all about contravention of provisions through acts and omissions of the respondent which they alleged contravened clear provisions of the Constitution.

The rights that are alleged to have been violated are guaranteed by the Constitution and there is no doubt about that. They therefore fall under the category for which declarations and remedies can be issued by other competent courts or tribunals under Article 50 of the Constitution and they need not take up the valuable time of this court. The matter therefore should have been lodged in another competent court or tribunal.

But before I take leave of this matter, it is pertinent to address the meaning of Article 43 (2) (c) of the Constitution, which was referred to inadvertently in the submissions of the petitioner and directly by counsel for the respondent, within the context of freedom of speech and expression, including freedom of the press and other media, which are provided for in Article 29 (1) (a) of our Constitution.

Article 43 of the Constitution provides that:

(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit-

a) political persecution;

b) detention without trial;

c) any limitation of the enjoyment of the rights and freedoms prescribed in this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided for in this Constitution.

The freedom of expression and speech has been the subject of interpretation by this court in various decisions including **Charles Onyango Obbo & Andrew Mujuni Mwenda v Attorney General, Supreme Court Constitutional Appeal No. 2 of 2002** and **Andrew Mujuni Mwenda & The East African v Attorney General, Constitutional Petitions No 12 of 2005** and **No. 3 of 2006**. The three cases were about the freedom of expression as it related to the established mass media at the time which predated the internet such as newspapers, radio shows and television news programs. Today, these media co-exist with the new media which are the outgrowth of the technological innovations around the internet, and which are the subject of this petition.

In **Andrew Mujuni Mwenda & the East African** (supra) the Supreme Court considered the following two issues:

i) Whether sections 39, 40, 41 and 179 of the Penal Code Act, Cap 120, are inconsistent with and or in contravention of Article 29 (1)(a) of the Constitution.

ii) Whether sections 39, 40, 41, and 179 of the Penal Code Act, Cap 120, being limitations of the enjoyment of the freedom of expression are acceptable and demonstrably justifiable in a free and democratic society under Article 43 (1) (c) of the Constitution.

In coming to their decision, the Supreme Court observed as follows:

"Our view is that the Supreme Court case of ***Charles Onyango Obbo and Andrew Mwenda*** *cited by all counsel, considered in depth and is*

an encyclopaedia to the evaluation of cases on (the) rights of speech and expression, media and other press and acceptable Constitutional limitations here and other democratic societies."

The Court quoted extensively from the judgment of Mulenga, JSC, where he enunciated the provisions of Articles 29 (1) vis-à-vis Article 43 (2) (c) of the Constitution and stated that one Article of the Constitution gives rights and the other creates restrictions on the enjoyment of those rights for the good of the rights of others, public interest and security of the state. That it therefore follows that the limitation of the enjoyment of rights and freedoms of an individual are those provided for in Article 43; those which prejudice fundamental or other human rights of others or public interest beyond what is acceptable and demonstrably justifiable in a free and democratic society. The court then referred to the following holding in the same judgement:

"However the limitation provided for in clause (1) is qualified by clause (2) which in effect introduces a limitation upon limitation.

It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2) which expressly prohibits the use of political persecution and detention without trial as a means of preventing, or measures to remove, prejudice to public interest.

In addition, they provided in that clause a yard stick, by which to gauge any limitation, imposed on the rights in defence of public interest. The yard stick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society.

This is what I have referred to as a limitation upon limitation. The limitation on the enjoyment of a protected right in the defence of public interest is in turn limited to the measure of that yard stick.

In other words, such limitation, however otherwise rationalized, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society"

The Court proceeded to dispose of the issues framed in that case bearing in mind the decisions in the cases cited, the provisions of Article 29(1) and the limitations under Article 43 (1) and 2 and came to the

conclusion that the burden of proof was on the respondent (Attorney General) to prove that allegations made against the petitioner, that what he uttered prejudiced the community interest and the limitation of his rights by being prosecuted for the criminal offence of sedition was justifiable and acceptable in a free and democratic society. The same test was applied to the other impugned provisions of the law complained about and ultimately, the court found in favour of the petitioner, since the respondent failed to discharge his burden.

The complaints raised in this petition go further into the rights of citizens that have been brought about by technological advancement in the use of new media: Facebook, Skype, Twitter and others, and mobile money transactions. The jurisprudence in that regard all over the world is nascent. But it still suggests that this courts has to render a strict construction of the restrictions in Article 43 (2) (c) with regard to Article 29 (1) of the Constitution.

The Supreme Court of India considered the legality and constitutionality of the total shut down of telecommunications and the internet in the Jamu and Kashmir Region in August 2019 in the case of **Anuradha Bhasin & Others v Union of India, Writ Petition (Civil) No. 1031 of 2019.**

The matter was about the total shutdown of the internet and restrictions of movement in the Jamu Kashmir Region which the Government of India claimed was to protect public order, amidst the escalation of the decades-long dispute between the two countries. This followed the issuance of the Constitution (Application to Jammu and Kashmir) Order, which stripped Jammu and Kashmir of its special status that it had enjoyed since 1954, making that country fully subservient to all provisions of the Constitution of India.

Following the order, the Government of India began to impose restriction which ultimately included the shutting down of mobile phone networks, internet services and landline connectivity, as well as imposing restrictions on movement and public assembly. The shutting down of the internet and movement restrictions limited the ability of journalists to travel and publish. Journalist thus challenged the restrictions as violations of Article 19 of the Constitution of India. It was in that context that the Supreme Court reviewed three of the petitions challenging the legality of the shutdown of the internet and travel restrictions.

Five questions were framed by Supreme Court of India for its determination but only two are relevant to this matter for purposes of establishing some principles from another jurisdiction in comparison to what has been established by the Constitutional and Supreme Courts in Uganda, but within the context of the use of *"other media"* referred to in Article 29 (1) of the Constitution of Uganda. The two questions were as follows:

i. Whether freedom of speech and expression and freedom to practice any profession, or carry on any occupation, trade or business over the Internet is part of the fundamental rights protected by Article 19(1) (a) and (g) of the Constitution of India.
ii. Whether the Government's action of prohibiting internet access was valid.

Article 19 (1) (a) of the Constitution of India provides for the right to freedom of speech and expression but restrictions may be imposed under Article 19 (2) thereof. The right to practice any trade or professions is guaranteed by Article 19 1(g) but also subject to the restrictions that may be imposed under paragraph 2 of Article 19.

Regarding the 1st issue, the court reiterated the position that freedom of expression under Article 19 of India's Constitution extended to the internet. There was already extensive jurisprudence that extended protections to new media for expression in India. In relation to access to information and business the court observed and declared that:

> *Therefore, the freedom of speech and expression through the medium of internet is an integral part of Article 19(1)(a) and accordingly, any restriction on the same must be in accordance with Article 19 (2) of the Constitution.*
>
> *In this context, we need to note that the internet is also a very important tool for trade and commerce. The globalization of the Indian economy and the rapid advances in information and technology have opened up vast business avenues and transformed India as a global IT hub. There is no doubt that there are certain trades which are completely dependent on the internet. Such a right of trade through internet also fosters consumerism and availability of choice. Therefore, the freedom of trade and commerce through the medium of the internet is also constitutionally protected under Article 19(1) (g), subject to the restrictions provided under Article 19 (6).*

The court then considered the principles upon which restrictions may be imposed and stated that in imposing restrictions under Article 19 (2) of the Constitution of India, there ought to be balance and proportionality, which are time honoured principles for the interpretation of rights and freedoms guaranteed under the broad spectrum of human rights. The court reviewed its decision in **Modern Dental College & Research v State of Madhya Pradesh (2019) 7 SCC 353**, where it was held that:

> *"The exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests."*

Unlike Uganda, India already had detailed laws and regulations under which telecommunication services may be suspended. The shutting down of the internet was therefore considered within the context of the

statutes and regulations made under them. With regard to the shut-down of the internet, the Supreme Court of India finally declared that:

i. *The freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation over the medium of internet enjoys constitutional protection under Article 19(1)(a) and Article 19(1)(g). The restriction upon such fundamental rights should be in consonance with the mandate under Article 19 (2) and (6) of the Constitution, inclusive of the test of proportionality.*

ii. *An order suspending internet services indefinitely is impermissible under the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017. Suspension can be utilized for a temporary duration, only.*

iii. *Any order suspending internet issued under the Suspension Rules, must adhere to the principle of proportionality and must not extend beyond the necessary duration.*

iv. *Any order suspending the internet under the Suspension Rules is subject to judicial review based on the parameters set out in its judgment.*

I am of the view that the parameters set by the Supreme Court of India for the Government of India are a good starting point to determine whether the shutdown of the internet during and after the 2016 General and Local Government Elections was consistent with the Constitution of Uganda. The appropriate tribunal should of course first and foremost consider the jurisprudence that has developed over Article 29 of the Constitution of Uganda.

In the end result, this petition could not be entertained by this court and it is hereby struck out. I make no order as to costs since the petition appears to have been filed in the public interest.

Irene Mulyagonja

27th - 04 - 2021

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
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1. **UNWANTED WITNESS UGANDA**
2. **TUMUHIMBISE NORMAN ..... PETITIONERS**

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

Coram: **Hon. Justice Richard Buteera, DCJ**
Hon. Justice Kenneth Kakuru, JCC
Hon. Justice Catherine Bamugemereire, JCC
Hon. Justice Christopher Madrama, JCC
Hon. Justice Irene Esther Mulyagonja, JCC

JUDGMENT OF JUSTICE CATHERINE BAMUGEMEREIRE, JCC

I have had the benefit of reading in draft the Judgment of my Learned Sister Irene Mulyagonja JCC. I agree with her conclusion. This petition involves the blocking and shutting down of social media and mobile money transfer services. The quest of rights to social media and electronic constitutional rights presents an area of constitutional interpretation that is novel.

A cursory look as to whether the above rights have become international law norms shows that there is quite a bit of discussion but no clear human right declared to form a right to the internet[1] and electronic money transfers. These rights which are an enablers to other rights such as the rights to expression of social media and financial services respectively are emerging rights. There are, however, general rights to freedom of speech and expression under Article 29(1) of the Constitution of Uganda (1995).

Beneath the blocking of social media and indeed blocking and shutting down of money transfer services, there is a an underlying complaint that the use the of internet to access certain social media is an infringement on the right to freedom of speech and social media which in short is freedom to communicate.

As it stands now there is a fundamental argument in the United Nations as to whether the right to internet should indeed become a basic human right. The 2003 World Summit on the Information Society (WSIS), convened by the UN Secretary General and organized by the International Telecommunication Union (ITU), created a unique opportunity to advance a strong claim for the Internet as a human right[2]. Article 19, of the Universal

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[1] Stephen Tully, A Human Right to Access the Internet? Problems and Prospects, *Human Rights Law Review*, Volume 14, Issue 2, Pages 175–195; Mathiesen, Kay 2012. "The Human Right to Internet Access: A Philosophical Defense". *The International Review of Information Ethics* 18 (December). Edmonton, Canada:9-22. http://informationethics.ca/index.php/irie/article/view/299.

[2] Michael Best, Can the Internet be a Human Right? Human Rights and the Internet edited by Steven Hick, Edward F. Halpin, and Eric Hoskins. New York: Palgrave Macmillan, 2000. 276pp

Declaration of Human Rights (United Nations, 1993), adopted in 1948 states as below:

"Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." (United Nations, 1997)

The above notwithstanding, the right to internet access and social media have not yet been recognized as a human right in spite of the use of the internet as an opportunity, empowerment and knowledge. The internet is critical in today's world and its importance in people's access to health, wealth, information and financial services cannot be understated.

These rights and responsibilities that come with social media need to be reconceptualized withing the frameworks of the rights to information and the rights to communicate since they have the tendency to empower and re-shape the world. That notwithstanding, the ability for harm to derive the same rights can happen in in equal measure. Indeed a right of social media access is looked at against other rights and competing interests including privacy, intellectual property protection and ensuring public order.

It is therefore about time that a safe way to access social media whether through the internet or through either means is guaranteed.

The internet is viewed as an enabler to other rights such as rights to expression which include opinion. The question as to whether the blocking

and shutting of social media is a question that needs to be brought to the fore front and clear solution found for it including but not limited to creating clear rights and responsibilities around it.

In the end I do agree with the conclusion of my learned sister, however, I would in the alternative refer the matter to the appropriate tribunals for first instance recourse and to give the necessary redress where a wrong is found.

27th - 04 - 2021

Hon. Lady Justice Catherine Bamugemereire

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA,

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VERSUS

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2. ELECTORAL COMMISSION} .....RESPONDENTS

CORAM:

HON. MR. JUSTICE RICHARD BUTEERA, DCJ

HON. MR. JUSTICE KENNETH KAKURU, JCC

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JCC

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC

HON. LADY JUSTICE IRENE ESTHER MULAYGONJA, JCC

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA, JCC

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Irene Mulyagonja, JCC and I agree with her that this court should not exercise jurisdiction in this Petition. I would only add a few words of my own on the question of the jurisdiction of the Constitutional Court.

The Constitutional Court is a court of interpretation and its jurisdiction is determined by the words of Article 137 (1) of the Constitution. Article 137 (1) clearly provides that *"any question as to the interpretation of this constitution shall be determined by the Court of Appeal sitting as a Constitutional Court."* It is therefore material that what should be lodged for determination of the Constitutional Court is *a question as to the interpretation of the constitution."* In that context, it has to be a controversy as to interpretation of the Constitution rather than a case for construction of an article of the Constitution and for enforcement. For instance, other

courts of competent jurisdiction and all authorities can construe any existing laws with the necessary qualifications, adaptations and modifications to bring it into conformity with the Constitution under article 274. They can only do so by interpreting the relevant article or articles of the Constitution. Similarly, judicial officers and courts are sworn to uphold the Constitution and can only do this by interpreting and applying any provision of the Constitution that is relevant to the case before them.

Where any question, issue or controversy as to the interpretation of the Constitution arises, it can be referred to the Constitutional Court for interpretation and directions as to the understanding, or the meaning, or scope or purpose of any article. This is by application of article 137 (5) of the Constitution. Article 137 (5) and (6) of the Constitution provides that:

> (5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court—
>
> (a) may, if it is of the opinion that the question involves a substantial question of law; and
>
> (b) shall, if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with clause (1) of this article.
>
> (6) Where any question is referred to the Constitutional Court under clause (5) of this article, the Constitutional Court shall give its decision on the question, and the court in which the question arises shall dispose of the case in accordance with that decision.

It is quite clear from a reading of article 137 (5) of the Constitution that in the course of interpretation of the Constitution by any other court, where any controversy or question as to the interpretation of the Constitution arises, the court may refer the question to the Constitutional Court if it is of the opinion that the question involves a substantial question of law and shall if any of the parties to the proceedings request it to do so, refer the question to the Constitutional Court for decision under article 137 (1) of the Constitution. Clearly article 137 (1) provides that any question as to interpretation of the Constitution shall be determined by the Constitutional Court. In its entirety, article 137 of the Constitution does not exclude other courts from interpreting the Constitution. It only restricts the jurisdiction of courts to interpretation only where there is no question as to interpretation. Where any question as to interpretation arises, that question or questions can only be determined by the Constitutional Court which has exclusive jurisdiction to determine such questions as to interpretation under article 137 (1) of the Constitution. It follows that in the course of enforcement of the Constitution, all courts are enjoined to interpret the Constitution and apply it unless they have

a doubt as to the meaning or scope or application of any particular article in which case then a controversy arises as to the interpretation of the Constitution which shall be referred for determination by the Constitutional Court. Similarly, any direct petition must disclose a question or controversy as to interpretation of the Constitution for this court to exercise its exclusive jurisdiction.

I further agree with my learned sister that where an article such as article 29 (1) of the Constitution has been interpreted under article 137 (1) of the Constitution and an appeal from the decision of the Constitutional Court has been determined by the Supreme Court, such decisions give guidance on how to apply the relevant or material article of the Constitution. For the court to consider the matter again, it must be demonstrated that another or additional controversy as to interpretation of the Constitution and in this case article 29 (1) has arisen which had not been clarified or determined by the Constitutional Court and the Supreme Court in the previous precedents. The Constitutional Court or the Supreme Court respectively, as courts of interpretation, should not repeat determination of questions as to interpretation other than to quote what has already been determined. It would be wrong and a move the counters the efforts of the court to clear its case backlog to saddle the Constitutional Court with constitutional petitions for determination of the meaning, scope, application or ambit of any article of the Constitution which are clear or which have been interpreted when a question as to interpretation was raised in the Constitutional Court concerning the very article or provision before. The articles of the Constitution ought to have become clearer for all other competent courts and authorities to apply without any further reference to the Constitutional Court. Moreover, the Constitutional Court has to defer handling other matters and invest the time and resources of a minimum of five Justices of Appeal to determine any petition. This obviously adversely affects the efforts and capacity of the court to clear its caseload.

In the premises, I concur with the judgment and orders proposed by my learned sister Hon. Lady Justice Irene Mulyagonja, JCC and I have nothing to add.

Dated at Kampala 27th day of April 2021

Christopher Madrama

Justice Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 016 OF 2017

1. UNWANTED WITNESS -UGANDA
2. TUMUHIMBISE NORMAN .....PETITIONERS

VERSUS

ATTORNEY GENERAL.....RESPONDENT

CORAM: Hon. Mr. Justice Richard Buteera, DCJ
Hon. Mr. Justice Kenneth Kakuru, JA/JCC
Hon. Lady Justice Catherine Bamugemereire B.K, JA/JCC.
Hon. Mr. Justice Christopher Madrama Izama, JA/JCC
Hon. Lady Justice Irene Esther Mulyagonja, JA/JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

I have had the benefit of reading in draft the Judgment of my learned sister Mulyagonja JCC. I agree with her that this petition ought to fail.

In this petition, we are required to answer the following questions.

1. Whether the actions of blocking and shutting down social media platforms and mobile money transfer services during the general elections of February 2016 by the respondent was a violation of Articles 29 (1) (a), 22 (1) and 45 of the Constitution.
2. Whether the petitioners are entitled to the remedies that they sought.

Upon the decision of *Onyango Obbo* and Another vs *Attorney General, Supreme Court Constitution Appeal No.2 of 2002* the *locus classicus* on this subject, the first question must be answered in the negative.

This is so because the right to access to information enshrined under Article 41, the right to freedom of conscience, expression, speech, thought, press and media enshrined under Article 29 are not absolute. They are all subject to the limitations set out in Article 43 of the Constitution. The question before us does not seek to answer whether, or not the petitioners' rights were limited, restricted or abridged beyond what is demonstrably acceptable in a free and democratic society and if so to what extent.

Had the petitioner sought an answer to the above question, then perhaps this Court would have proceeded to answer it. However, it is self evident that in this time and age of the electronic communication revolution, everyone in one way or the other would be adversely effected by its shut down. It is a question too obvious for this Court to answer. Even if the internet had been shut down for a day, it would still have had serious consequences on some individuals and perhaps none or very limited on others.

The question therefore is one of the fact. It is whether the shutting down of the internet, to the extent that it was, for the period that it was and for the reasons that it was, went beyond what is demonstrably justifiable in a free and democratic society. This is not the question before us. I will therefore not attempt to answer it.

Attempting to do so would be an exercise in futility as the petitioner having failed to frame a correct question could not have provided sufficient supporting facts. The petition would have entailed a comparative study detailing the circumstances under which the internet may be shut down in free and democratic societies. This is an objective test set out in Article 43(2)(c) of the Constitution. This petition however, is entirely, premised on a subjective view of the petitioner. I am well aware of the constitutional principle that the burden of justifying the derogation of a right falls on the respondent. See: *Onyango Obbo* and Another vs *Attorney General* (Supra).

Nonetheless the petition on the face of it has to show that there is indeed a question as to the interpretation of the Constitution. See:- *Attorney General vs Major General David Tinyefunza, Constitutional Appeal No.1 of 1997, Mbabaali Jude Vs Hon. Edward Kiwanuka Ssekandi, Constitutional Petition No. 0028 of 2012, Ismael Serugo vs Kampala City Council and Attorney General, Supreme Court Constitutional Appeal No. 2 of 1998 (unreported).*

Upon the reading of the petition itself and the affidavits accompanying it, I have failed to find to any question as to the interpretation of the Constitution which has not already been answered by this Court and the Supreme Court.

I find that the petitioner does not disclose a reasonable a cause of action as a result.

I would accordingly strike it out on that account with no order as to costs.

Before I take leave of this matter I would like to observe that a number of NGOs and individual citizens are bringing to this Court, well intended but poorly conceived petitions. These petitions are shallow both in form and substance. It could be that they are encouraged by past success of public interest cases at this Court or by the fact that this Court has adopted an unwritten rule of not condemning unsuccessful petitioners to costs.

Whatever the case, there is serious need to ensure that only deserving petitions are heard. This Court in my view should proceed to strike out unfounded petitions summarily and only proceed to hear and determine deserving ones.

Dated at **Kampala** this ....27th....day of ....04.... 2021.

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Kenneth Kakuru
JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Buteera, DCJ; Kakuru, Bamugemereire, Madrama, Mulyagonja; JJA/JJCC]

CONSTITUTIONAL PETITION NO. 016 OF 2017

1. **UNWANTED WITNESS-UGANDA**
2. **TUMUHIMBISE NORMAN:::::::::::::::::::::::::::: PETITIONERS**

VERSUS

ATTORNEY GENEREAL::::::::::::::::::::::::::::::::RESPONDENT

JUDGMENT OF RICHARD BUTEERA, DCJ

I have had the benefit of reading in draft the judgment of my learned sister Irene Mulyagonja, JA/JCC and I agree with her that this petition fails for the reasons she has set out in her judgment. I also concur with the orders she has proposed.

As Kakuru, Bamugemereire and Madrama, JJA/JJCC also agree, this petition is hereby struck out with no orders as to costs.

Dated at Kampala this.....27th.....day of.....April.....2021

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RICHARD BUTEERA

DEPUTY CHIEF JUSTICE